# IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT SECTION 498A OF THE CRIMINAL CODE, BEING CHAPTER 56 OF THE STATUTES OF CANADA, 1935.

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* Jan. 15, 16, 17.
* June 17.

*Constitutional law—Section 498A Cr. C.—Persons engaged in trade or commerce or industry—Certain acts by them declared to be criminal offences—Whether section is intra vires of Parliament of Canada—Whether subsection (a) encroaches upon legislative authority of the provinces.—B.N.A. Act, ss. 91, 92.*

Subsections (*a*), (*b*) and (*c*) of section 498A of the Criminal Code, which enact that "every person engaged in trade or commerce or industry is guilty of an indictable offence and liable" to punishment in respect thereof who does any of the acts or series of acts denoted by these subsections, are *intra vires* of the Parliament of Canada, being enactments creating criminal offences in exercise of the powers vested in Parliament in virtue of the 27th head of section 91 of the B.N.A. Act (Criminal law). Cannon and Crocket JJ. dissenting as to subsection (*a*).

*Per* Cannon and Crocket JJ.—Subsection (*a*) deals directly with matters of civil rights and describes an act which lacks every element of what is ordinarily associated with criminal law. Its incorporation in the Criminal Code is a mere colourable attempt on the part of the Parliament of Canada to encroach upon the legislative authority of the provinces.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following question: Is section 498A of the Criminal Code, or any or what part or parts of the said section *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court is as follows:

The Committee of the Privy Council have had before them a report, dated 30th October, 1935, from the Minister of Justice, referring to an Act to amend the Criminal Code, being chapter 56 of the Statutes of Canada, 1935, and in particular to section 9 of the said Act, whereby the Criminal Code was amended by inserting therein after section 498 the following section:

"498A. Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a

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penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who

(*a*) is a party or privy to, or assists in, any transaction or sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(*b*) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(*c*) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor."

The Minister observes that said section 498A was enacted for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads but that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact this section, in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the *Supreme Court Act:*

Is said section 498A of the Criminal Code, or any or what part or parts of the said section, ultra vires of the Parliament of Canada?

E. J. LEMAIRE,
*Clerk of the Privy Council.*

* *N. W. Rowell K.C., Louis St-Laurent K.C.*, and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

*A. W. Roebuck K.C.* (Attorney-General) and *I. A. Humphries K.C.* for Ontario.

*Charles Lanctot K.C.* and *Aimé Geoffrion K.C.* for the Attorney-General of Quebec.

*D. V. White* for the Attorney-General of New Brunswick.

*G. McG. Sloan K.C.* (Attorney-General) and *J. W. deB. Farris K.C.* for British Columbia.

*J. Allen K.C.* for the Attorney-General of Manitoba.

*W. S. Gray K.C.* for the Attorney-General of Alberta.

*S. Quigg* for the Attorney-General of Saskatchewan.

The judgment of Duff C.J. and Rinfret, Davis and Kerwin JJ. was delivered by

DUFF C.J.—Section 498A, the validity of which is in question, is in these terms:

498A. (1) Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment or, if a corporation, to a penalty not exceeding five thousand dollars, who

(*a*) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(*b*) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(*c*) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor.

This section in substance declares that everybody is guilty of an indictable offence and liable to punishment in respect thereof who does any of the acts or series of acts denoted by subsections (*a*), (*b*) and (*c*). We see no good reason for denying the authority of Parliament, under subdivision 27 of section 91 of the B.N.A. Act, to pass these enactments.

*Reporter's note:* Same counsel also appeared at the argument of all the other References reported.

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*Prima facie,* they are enactments in relation to matters comprehended within the subject designated by the words of the 27th head of section 91, under any definition of "the criminal law." The prohibitions seem to be aimed at the prevention of practices which Parliament conceives to be inimical to the public welfare; and each of the offences is declared in explicit terms to be an indictable offence.

There is nothing in the circumstances or the operation of these provisions to show that Parliament was not exercising its powers under that subdivision. Whatever doubt may have previously existed, none can remain since the decision of the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1), that, in enacting laws in relation to matters falling within the subject of the criminal law, as these words are used in section 91, Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear to a court of law to be "in their own nature" criminal. The jurisdiction in relation to the criminal law is plenary; and enactments passed within the scope of that jurisdiction are not subject to review by the courts.

It is true that the term "criminal law" in section 91, subdivision 27, must be read subject to some qualification upon the ordinary sense of the words. When it is said that "criminal law" in section 91 (27) is criminal law in its widest sense, it is not meant that by force of section 92, including subdivision 15 of that section, the provinces have no power to pass enactments which would fall within the scope of the "criminal law," as that phrase would ordinarily be understood as applied to the enactments of a legislature possessing a general competence in relation to the criminal law. People in Canada are familiar with a network of prohibitions and regulations, the violation of which is punishable by fine, and sometimes by imprisonment, under municipal bylaws passed under the authority of provincial legislative measures. It has been held in many cases that prohibitions enforceable by fine and imprisonment enacted by the provincial legislatures may be valid enactments under section 92. Notable instances are the prohibitions enacted under the local option law

(1) [1931] A.C. 310.

of Ontario which was in question in *A.G. for Ontario* v. *A.G. for Dominion* (1); and the conditional and qualified prohibitions enforceable in the same way which were upheld in *Hodge* v. *The Queen* (2). Then there are the groups of provincial statutes passed under the authority of section 92 (1) dealing with the disqualification of voters; the disqualification of persons elected to sit and vote as members of the provincial legislatures; in which offences are created punishable by fine and imprisonment. These enactments which, in part at least, have the purpose of securing public order, and protecting the integrity of the representative system in the provinces, would, as I have said, fall within almost any definition of criminal law.

By the introductory clause of section 91, it is declared:

* * * that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated;

which classes of subjects include the "criminal law"; and the final paragraph of that section declares, in effect, that "any matter coming within" the criminal law shall not be deemed to come within any matter of a local or private nature

comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Clearly, if the term "criminal law" is used in an absolutely unrestricted sense (in subdivision 27), then nothing in the nature of criminal law could be enacted under the authority of section 92. As Lord Herschell observed in the course of the argument on the reference already mentioned, in 1896, respecting the Ontario Local Option Statute, the term "criminal law" in subdivision 27 must be construed in such a way as to leave room for the operation of enactments of a provincial legislature under section 92 of the character just adverted to. It is also well settled that the Parliament of Canada cannot acquire jurisdiction over a subject which belongs exclusively to the provinces by attaching penal sanctions to legislation which in its pith and substance is legislation in relation to that subject in its provincial aspects alone (*In re Insurance Act of Canada*) (3).

(1) [1896] A.C. 348. (2) (1883) 9 A.C. 117.
(3) [1932] A.C. 41, at 53.

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We do not think any of these considerations are properly applicable to the statute before us. We think there is no ground on which we can hold that the statute, on its true construction, is not what it professes to be: an enactment creating criminal offences in exercise of the powers vested in Parliament in virtue of the 27th head of section 91.

The statute being *intra vires,* the interrogatory addressed to us should be answered in the negative.

CANNON J.—Paragraph (*a*) of 498A injects into every contract of sale by a person engaged in trade, commerce or industry a stipulation, obligatory under pain of a fine or imprisonment, in favour of the competitors of the purchaser, that any discount, rebate or allowance granted to the purchaser would be available at the time of the transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity.

This would, in every such case, be an application, by force of law, to every competitor of the purchaser as against the vendor of the "stipulation pour autrui" provided for by article 1029 of the Civil Code of the province of Quebec, which says:

"A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes for another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it."

*Prima facie,* therefore, Parliament has legislated directly in a matter of civil rights and has simply annexed to it a sanction, which would, by force of 91 (27) transfer the subject-matter from the provincial to the federal realm.

Blackstone, in his Commentaries, divides the wrongs known to the law into two species, private and public wrongs, considering torts under the former and crimes under the latter denomination. He says:

The distinction seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs or crimes are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder and robbery are properly ranked among crimes; since, beyond the injury done to individuals, they strike at the very being of

the society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

The first characteristic of a crime, therefore, is the danger to the community as a whole which the conduct of the offender is felt to involve. It may, from this point of view, be said to be the breach of a general obligation imposed by the law for the benefit of the State; whereas a tort is the breach of a particular obligation imposed by the law for the benefit of the individual.

The second characteristic by which a crime may be recognized is to be found, not in the nature of the conduct itself, but in the consequences to which that conduct gives rise. Whereas the object of the law in the case of a tort is primarily the *compensation* of the party injured, its object in the case of crime is primarily the *punishment* of the offender. The civil law looks rather to the plaintiff, the criminal law to the defendant. If, then, the result of the proceedings is the satisfaction of the plaintiff, we may expect to find that the conduct in question amounts to a tort; if it is the punishment of the defendant, then it will be a crime. The result of this difference in attitude is reflected in the royal power of *Pardon*. The King may pardon a criminal, but not a civil offence. It is reasonable that he should have the power to waive an injury to the State of which he is the representative, and to put an end to proceedings which are carried on in his name; but he cannot absolve a defendant in a civil action from the duty of making compensation to the individual whom he has injured.

The above is taken from Stephen's Commentaries of the Laws of England, 19th ed., vol. IV, pp. 3, 4 and 5, where he gives as an approximate definition of crime that it is the breach of an obligation imposed by law for the benefit of the community and which results in the punishment of the offender.

Every command involves a sanction; and thus every law forbids every act which it forbids at all under pain of punishment. This makes it necessary to give a definition of punishment as distinguished from sanction.

The sanctions of all laws of every kind will be found to fall under two great heads; those who disobey them may be forced to indemnify another person either by damages or by specific performance, or they may themselves be subjected to some sufferings. In each case the legislator

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enforces his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying. It must be imposed for public purposes, and have no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, but they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public. The result of the cases appears to be that the infliction of punishment in the interest of the public is the true test by which criminal are distinguished from civil proceedings, and that the moral nature of the act has nothing to do with the question. It is sufficient in this place to observe that they illustrate the general proposition that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment in the interest of the public.

I conclude that the first paragraph (*a*) does not fill the foregoing requirements, inasmuch as it has in view only the protection of the individual competitors of the vendor, not the maintenance of public order or the promotion of the public weal. It deals exclusively with the civil law, and the only logical sanction to enforce the stipulation in favour of an aggrieved competitor would be to give him against the discriminating vendor a recourse in damages for compensation of any damage resulting from a refusal to sell to him at the same price goods of like quality and quantity. The penalty imposed amounts only to a colourable attempt to invade the provincial field.

Sections (*b*) and (*c*), on the other hand, are genuine criminal legislation, according to the above *criteria.*

I, therefore, say that subsection (*a*) of section 498A, with the penalties attached, does not come within the definition of criminal law and is *ultra vires;* subsections (*b*) and (*c*) would be *intra vires* of the Parliament of Canada.

CROCKET, J.—It must, I think, be taken as established by the decisions of this Court and the Judicial Committee of the Privy Council that the Parliament of Canada cannot arrogate to itself any legislative jurisdiction, which it would otherwise not possess, in relation to any of the classes of subjects enumerated in s. 92 of the B.N.A. Act, by merely dealing with any such subject as criminal law under head 27 of s. 91; and that if, when examined, any legislation, though inserted in the Criminal Code, is found to deal with matters exclusively committed to the legislative jurisdiction of the provinces by s. 92, and not to be criminal in its essence, such legislation ought to be declared to be invalid. This principle was clearly affirmed by the Judicial Committee of the Privy Council in its judgment in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), delivered by the present Chief Justice of this Court. In that case the Judicial Committee was considering an amendment to s. 508 of the Criminal Code, adding thereto a provision which declared it to be an indictable offence for any person to solicit or accept any insurance risk except on behalf of a company or association licensed under the Dominion *Insurance Act,* 1917. The Board held that the amendment was invalid, since, in substance though not in form, it was in regulation of contracts of insurance, subjects not within the legislative competence of the Dominion. The Right Honourable Mr. Justice Duff (as he then was) in delivering the judgment of the Board, after reviewing the relevant previous decisions of the Judicial Committee, including the *Board of Commerce* case (2), and quoting extensively from the judgment of the Supreme Court of the United States in *Hammer* v. *Dagenhat* (3), said at pp. 339 and 340:

> It is not seriously disputed that the purpose and effect of the amendment in question are to give compulsory force to the regulative measures of the *Insurance Act,* and their Lordships think it not open to controversy that in purpose and effect s. 508C is a measure regulating the exercise of civil rights. But, on behalf of the Dominion, it is argued that, although such be the true character of the legislation, the jurisdiction of Parliament, in relation to the criminal law, is unlimited, in the sense, that

(1) [1924] A.C. 328. (2) [1922] 1 A.C. 191.
(3) (1918) 247 U.S. 251.

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in execution of its powers over that subject-matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or the conditions in which the act is done, and consequently that s. 508C, being by its terms limited to the creation of criminal offences, falls within the jurisdiction of the Dominion.

The power which this argument attributes to the Dominion is, of course, a far-reaching one. Indeed the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the provinces, in respect of which exclusive jurisdiction is given to the provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.

And later, at pp. 342 and 343 His Lordship added:

And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which, as Lord Watson said in *Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1), was "not to weld the Provinces into one or to subordinate the Provincial Governments to a central authority," "Within the spheres allotted to them by the Act the Dominion and the Provinces are," as Lord Haldane said in *Great West Saddlery Co.* v. *The King* (2), "rendered in general principle co-ordinate Governments."

Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.

In the *Board of Commerce* case (3) in 1921 the Judicial Committee considered the question of the validity of an order made by the Board of Commerce, under the *Board of Commerce Act* and the *Combines and Fair Prices Act,* enacted by the Dominion Parliament in 1919, restraining certain manufacturers of clothing in the city of Ottawa in respect of sale prices of their products. Parliament purported to authorize the Board of Commerce to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the provinces as the Board might consider to be detrimental to the public interest and to give the Board authority also to restrict accumulation of food, clothing and fuel beyond

(1) [1892] A.C. 437. (2) [1921] 2 A.C. 100.
(3) [1922] 1 A.C. 191.

the amount reasonably required in the case of a private person for his household and in the case of a trader for his business, and to require the surplus to be offered for sale at fair prices. The Board was also authorized to attach criminal consequences to any breach of the Act which it determined to be improper. The Judicial Committee held that both these Acts were ultra vires the Dominion Parliament, since they interfered seriously with property and civil rights in the provinces, a subject reserved exclusively to the provincial legislatures by s. 92, and were not passed in any highly exceptional circumstances, such as war or famine, which conceivably might render trade combinations and hoarding outside the heads of s. 92 and within the general power given by s. 91. Counsel for the Dominion in that case argued that the legislation fell under s. 91 (2): The regulation of Trade and Commerce, and also that it fell within s. 91 (27): The Criminal Law, etc. Both these contentions were rejected for the reasons stated. Dealing with the criminal law contention, Lord Haldane, in delivering the judgment of the Board said—

> For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application.

The learned counsel for the Dominion in the present case strongly argued that the authority of both the *Board of Commerce* (1) and the *Reciprocal Insurers* (2) cases had been materially modified by the decision of the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (3). I can find nothing in the judgment in the last-named case, as delivered by Lord Atkin, which detracts in any manner from the authority of either the *Board of Commerce* (1) or the

(1) [1922] 1 A.C. 191. (2) [1924] A.C. 328.
(3) [1931] A.C. 310.

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*Reciprocal Insurers* (1) cases, as regards the interpretation of 91 (27).

The Board in the later case was dealing with the validity of this very section of the Criminal Code, as it stood in Revised Statutes of Canada, 1927, ch. 36, which made it an indictable offence, punishable by fine or imprisonment, to conspire, combine or agree unduly to limit transportation facilities, restrain commerce or lessen manufacture or competition, as well as with s. 36, Revised Statutes of Canada, 1927, ch. 26 (*The Combines Investigation Act*), which made it an indictable offence punishable by fine or imprisonment to be a party to the formation or operation of a combine, as defined by s. 2, viz: a combine "which is to the detriment of the public and restrains or injures trade or commerce." Lord Atkin at p. 317, as reported, said:—

> Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires;* nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. *But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class.* On this issue the legislative history may have evidential value.

And His Lordship, after setting out the history of the Act and of section 498, as it stood in the Revised Statutes, 1927, distinctly stated:—

> Their Lordships have dealt at some length with the provisions of the Acts of 1919 inasmuch as the appellants relied strongly on the judgment of the Board in *In re Board of Commerce Act,* 1919 (2), which held both Acts to be *ultra vires.* Unless there are material distinctions between those Acts and the present, it is plainly the duty of this Board to follow the previous decision. It is necessary therefore to contrast the provisions of the Acts of 1919 with the provisions of the Act now in dispute.

He then proceeded to point out that by the new Act combines were defined as combines "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others," and which "are mergers, trusts or monopolies, so-called," or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport, or of fixing a common

(1) [1924] A.C. 328. (2) [1922] 1 A.C. 191.

price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or "otherwise restraining or injuring trade or commerce." After reviewing the provisions of the Act, His Lordship added:—

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities, which can be so described, are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense.": *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1). It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only *the quality* of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe J. that the passage in the judgment of the Board in the *Board of Commerce* case (2), to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment.

I do not think it can fairly be said that any of the passages which I have quoted at such length from Lord

(1) [1903] A.C. 524. (2) [1922] 1 A.C. 191.

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Atkin's speech were intended to disapprove of anything previously laid down in the judgments of the Board in either the Board of Commerce or the *Reciprocal Insurers* case (1). The most that can be said is that Their Lordships agreed that the allusion which Lord Haldane made in the *Board of Commerce* case (2) to Parliament exercising " exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence " was not intended as a definition of criminal law as used in 91 (27), and that the quoted reference was made merely for the purpose of illustrating the difference between Parliament legislating genuinely on a matter which was obviously one of criminal law and legislating on a matter which was merely a colourable attempt to encroach upon provincial legislative jurisdiction. I think the same thing may be said of the observations which Lord Atkin himself made regarding the quality of a criminal act, that none of those observations were intended to lay down definitely the principle that the mere fact of Parliament prohibiting an act and attaching penal sanctions thereto must in all cases be taken as conclusive evidence of the criminal character of any legislation, the constitutional validity of which is called in question. Indeed, the whole judgment, in my opinion, indicates quite the contrary. One cannot read it throughout without seeing that the Board in that case itself considered very carefully the character of the legislation there under review in determining whether or not it was or was not genuine criminal legislation within the meaning of 91 (27). Indeed, the decision, in my opinion, far from modifying, actually confirms the principle laid down in the previous cases, as witness the statement that " one of the questions to be considered," in case of controversy between the two legislative powers " is always whether in substance the legislation falls within an enumerated class of subject or whether, on the contrary, in the guise of an enumerated class it is an encroachment on an excluded class."

I cannot therefore agree to the proposition that the jurisdiction of Parliament in relation to criminal law is plenary and that enactments passed within the scope of

(1) [1924] A.C. 328. (2) [1922] 1 A.C. 191.

that jurisdiction are not subject to review by the courts, if by that it is meant to say that the courts have no right to review the quality and character of any legislation which Parliament chooses to place in the criminal code. Once it is determined that any such legislation in reality is of a criminal character, the courts of course will not presume to consider its wisdom or unwisdom, but in my opinion it is not only their right, but their clear duty to scrutinize any enactments, which are inserted in the criminal code, for the purpose of deciding whether they are or are not of such a quality or character as can properly be described as criminal law within the meaning of s. 91 (27). I can conceive of no other way in which a controversy as to legislative jurisdiction to enact a criminal law within the meaning of s. 91 (27) can properly be decided. If the mere fact of its enactment is itself to be regarded by the courts as conclusive, there would, as pointed out in the *Reciprocal Insurers'* case (1), be no class of civil rights over which the Parliament of Canada could not assume exclusive legislative control by the mere device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.

Having examined the three subsections, which Parliament added to s. 498 of the Criminal Code, as we must do in order to determine their purpose and effect and answer the question, which the Governor in Council has submitted to us in regard to them, I have concluded that (*b*) and (*c*) allege offences which might reasonably be held to be of a criminal character, inasmuch as both require a specific intent to destroy competition or to eliminate a competitor —a thing which is bound in the end to operate to the detriment or against the interest of the public. The essential ingredient of the offence, as described in each of these subsections, is the intent to cause injury to the public or to an individual. They both, therefore, present on their face the characteristic feature of crime, viz: the intent to do wrong. In this respect they are in marked contrast with (*a*), which purports to make it a crime for anyone to be a party to any transaction of sale, which discriminates to his knowledge against the competitors of the purchaser in that any discount, rebate or allowance is granted to the

(1) [1924] A.C. 328.

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purchaser, over and above any discount, rebate or allowance available at the time to such competitors in respect of a sale of goods of like quality or quantity. No intent to destroy competition or to eliminate an individual competitor is required. On the contrary its apparent object is to prevent the granting of discounts, rebates or allowances to large scale purchasers of manufactured and all other goods for any reason whatever and to make the price of commodities uniform, as far as possible, and by this expedient to raise retail prices throughout the country and thus to deprive the great mass of the consuming population of the benefit of real competition in trade. Such a policy may be desirable and beneficial to a particular class of the population, but its purpose and effect is purely economic and involves the virtual control by Parliament of such subjects as contracts of sale, which the B.N.A. Act has assigned to the exclusive jurisdiction of the Provincial Legislatures, which, in my judgment, if I may say so, are in a much better position to deal with such subjects as matters of local and provincial concern than the federal Parliament. The crucial question, however, with which we are called upon to deal is as to whether such agreements as those described in (*a*) can legitimately be classed as falling under the head of criminal law. In my opinion s.s. (*a*) describes an act, which lacks every element of what is ordinarily associated with criminal law, either in the minds of lawyers or of laymen. It describes a thing which is neither civilly nor moraly wrong in itself under the cloak of discrimination. I have no hesitation in saying that in my opinion it is not genuine criminal legislation and that, dealing as it does with a subject matter of such a character, its incorporation in the criminal code should be held to be a mere colourable attempt on the part of Parliament to encroach upon the legislative authority of the provinces.

I shall, therefore, answer the question which has been submitted to us in respect of these enactments that s.s. (*a*) of 498A of the Criminal Code is *ultra vires* of the Parliament of Canada.